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In the Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION, PETITIONER

v.

NEW ENGLAND POWER COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-13a) is reported at 467 F.2d 425. The initial order (No. 427) of the Federal Power Commission (App. D, *infra*, pp. 18a-50a) and its order denying rehearing (App. E, *infra*, pp. 51a-60a) are reported at 45 FPC 440 and 45 FPC 964.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1972 (App. B, *infra*, pp. 14a-15a), and the Commission's petition for rehearing was denied on September 25, 1972 (App. C, *infra*, pp. 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under Title V of the Independent Offices Appropriations Act, 1952 (31 U.S.C. 483a) to recoup a portion of its costs of administering the Federal Power Act, 16 U.S.C. 791a, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, through the imposition of annual fees on companies subject to its jurisdiction after taking into consideration the benefits such companies receive from Commission regulation.

STATUTE INVOLVED

Title V of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a, provides:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act

of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

STATEMENT

This case involves the authority of federal agencies under Title V of the Independent Offices Appropria-

tions Act, 1952 (31 U.S.C. 483a) to recoup their administrative costs from the companies they regulate. The court of appeals construed Title V as not authorizing the Federal Power Commission to assess annual fees against public utilities[1] and natural gas companies[2] subject to its jurisdiction to recover those administrative costs not recouped by specific filing and other fees (App. A, *infra*, pp. 1a-13a).

A. BACKGROUND

Since the enactment of the Federal Water Power Act of 1920, now Part I of the Federal Power Act, 16 U.S.C. 791a-823, the Federal Power Commission has assessed annual and other charges against licensees of hydroelectric projects to reimburse the United States for the Commission's costs of administering the Act. The imposition of these charges is specifically authorized by Part I of the Act. See 16 U.S.C. 803(e) and (f); 18 C.F.R. 11.20, 11.30. However, neither Parts II and III of the Federal Power Act, 16 U.S.C. 824, *et seq.*, nor the Natural Gas Act, 15 U.S.C. 717, *et seq.*, specifically direct the Commission to assess annual or other charges against companies subject to those statutes; accordingly, no charges were imposed.

In 1951, Congress enacted Title V of the Independent

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[1] Under Section 201(b) and (e) of the Federal Power Act, 16 U.S.C. 824(b) and (e), a "public utility" is defined as any person who owns or operates facilities for the transmission or sale for resale of electric energy in interstate commere.

[2] Under Section 2(6) of the Natural Gas Act, 15 U.S.C. 717a(6), a "natural-gas company" is defined as a person engaged in the transportation or sale for resale of natural gas in interstate commerce.

Offices Appropriations Act, 1952 (31 U.S.C. 483a). The House report on Title V shows that Congress was concerned that the government was not receiving full return for many of the services it was providing to special beneficiaries. The report noted that in some cases "no fees are charged even though the charging of fees is not prohibited * * *." H. Rep. No. 384, 82d Cong., 1st Sess., p. 2. To remedy this situation, Title V was proposed to

> * * * provide authority for Government agencies to make charges for * * * services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. * * * [*Id.* at 3.]

As enacted, Title V provides in essence that any work, service, benefit or privilege performed, provided or granted by any federal agency to any person shall be self-sustaining to the fullest extent possible. Accordingly, the federal agencies are authorized to prescribe fees and charges which are

> * * * fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts * * *. [31 U.S.C. 483a.]

All amounts collected under the statute are to be paid into the United States Treasury as miscellaneous receipts.

Bureau of the Budget Circular No. A-25 (September 23, 1959; set forth in App. F, *infra*, pp. 61a-62a)

establishes guidelines to assist agencies in the implementation of Title V. The circular directs that where a service bestows special benefits upon identifiable recipients "above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." The circular states, for example, that a charge should be imposed where a government service "[p]rovides business stability or assures public confidence in the business activity of the beneficiary (*e.g.*, certificates of necessity and convenience for airline routes, or safety inspections of crafts) * * *." The circular also provides that:

> No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

Pursuant to Title V and the Bureau of the Budget Circular, the Federal Power Commission in 1966 established a schedule of filing fees under the Natural Gas Act. Order Nos. 317 and 317-A, 35 FPC 30, 31 Fed. Reg. 431, 4890. Subsequent to the adoption of these fees, congressional appropriations committees recommended that federal agencies review their fee schedules with a view to making increases or adjustments to offset in part the increasing amounts which had to be appropriated by Congress to cover the operating costs of the agencies. S. Rep. No. 1375, 90th Cong., 2d Sess., p. 3; H. Rep. No. 1348, 90th Cong., 2d Sess., p. 4. And in 1970, the chairman of a House appropriations sub-

committee specifically requested the Federal Power Commission to review its fees, and urged the Commission to assess sufficient charges against natural gas companies and utilities subject to its jurisdiction to sustain its administrative operations. The chairman noted with approval the proposed increased fees which had recently been announced by the Federal Communications Commission.[3] Those fees were subsequently adopted by the FCC (23 FCC 2d 880, 35 Fed. Reg. 10988) and upheld by the Fifth Circuit. *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313 (reproduced in App. G, *infra,* pp. 63a-81a), petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.*, No. 72-948.

B. PROCEEDINGS BEFORE THE COMMISSION

Following an extensive review of its existing fee structure and its administrative operations, the Commission proposed (1) to increase the filing fees under the Natural Gas Act, (2) to establish filing fees for applications under Parts II and III of the Federal Power Act, and (3) to recoup a portion of the remaining costs of its regulatory programs under both Acts through annual assessments. Notice of Proposed Rulemaking, Docket No. R-408, issued November 25, 1970, 35 Fed. Reg. 18324. Following the receipt of comments by sixty-four parties, the Commission issued Order No.

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[3] Hearings before a Subcommittee of the House Committee on Appropriations, 91st Cong., 2d Sess., on Independent Offices and Department of Housing and Urban Development Appropriations for 1971, part 2, p. 951.

427, adopting the proposed fees with several modifications (App. D, *infra*, pp. 18a-50a).

Under the Commission's order, annual charges[4] are assessed as follows: With respect to electric utilities, the Commission determines each year the costs of administering Parts II and III of the Federal Power Act other than those costs associated with the Commission's efforts to promote the coordination and reliability of electric systems. The Commission then deducts from the administration costs the costs associated with services rendered to electric systems not subject to the Commission's jurisdiction and the amounts received during the year from filing fees. The remaining balance is assessed against jurisdictional utilities in proportion to their wholesale sales and interchanges of electric energy. The costs of administering the Commission's reliability and coordination programs, after deducting the portion of the costs attributable to nonjurisdictional utilities, are assessed against jurisdictional utilities in proportion to their gross revenues (App. D, *infra*, pp. 37a-38a).

With respect to natural gas companies, the Commission determines each year the costs of administering the Commission's natural gas pipeline programs under the Natural Gas Act. These costs, after deducting the amounts received from filing fees, are assessed against all natural gas companies with annual operating revenues of $1,000,000 or more in proportion to their deliveries of natural gas in interstate commerce. In ad-

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[4] Only the portion of the Commission's order establishing annual charges was set aside by the court below. The new filing fees were not challenged and are now in effect.

dition, all natural gas companies required to file an annual report on their total gas supply on FPC Form No. 15 (see 18 C.F.R. 260.7) are assessed one-tenth of a mill for each thousand cubic feet of new reserves of natural gas certified each year (App. D, *infra*, pp. 45a-46a).

In its order establishing the annual charges, the Commission identified the benefits accruing to utilities and natural gas companies from the administration of Parts II and III of the Federal Power Act and the Natural Gas Act. With respect to electric utilities, the Commission referred to the impact of its coordination and reliability programs on the stability and operations of the electric industry (App. D, *infra*, p. 20a). With respect to both electric utilities and natural gas companies, the Commission noted that federal regulation had provided "the foundation for the sound financial condition which public utilities and natural gas companies have achieved" (*id.* at 30a).[5] The Commission referred, in particular, to the "industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system" (*id.* at 30a, n.5). See 16 U.S.C. 825; 15 U.S.C. 717g. The Commission recognized, of course, that its regulatory activities provide continuing benefits to consumers, but also noted that its actions

> * * * have redounded to the benefit of both indus-

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[5] The Commission pointed out that the extension of its jurisdiction in 1935 to electric utilities "was prompted in substantial part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected" (App. D, *infra*, p. 30a).

> tries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. [App. D, *infra*, p. 31a.]

In its order denying rehearing, the Commission again noted that its promotion of the coordination and reliability of the nation's electric systems was "system wide and beneficial" to electric utilities (App. E, *infra*, p. 55a). With respect to natural gas companies, the Commission referred to the direct benefits pipelines receive from the Commission's regulation of the prices producers may charge for interstate sales of natural gas to pipelines. The Commission also identified other of its activities, in connection with the certification of producer sales, that benefited pipelines. The activities mentioned were (*id.* at 57a):

> * * * the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

C. THE DECISION BELOW

On petitions for review, the court of appeals set aside the portion of the Commission's order establishing annual charges, holding that the charges were not au-

thorized by Title V of the Independent Offices Appropriations Act, 1952, or Bureau of the Budget Circular No. A-25 (App. A, *infra*, pp. 1a-13a). In the court's view, the favorable "economic climate" resulting from federal regulation was not a benefit for which a charge could be made, since it was not a special service rendered to a special beneficiary (*id.* at 9a). The court concluded that the regulation of the electric and natural gas industries is "primarily for the benefit of the public" and that "[t]here is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public" (*id.* at 9a-10a).

REASONS FOR GRANTING THE WRIT

The decision below improperly restricts the authority of federal agencies under Title V of the Independent Offices Appropriations Act, 1952, 31 U.S.C. 483a, to recoup a portion of their administrative costs from the companies they regulate. In its holding that annual charges for regulating activities which benefit an entire industry may not be imposed, the decision below would severely limit the ability of federal agencies to carry out the congressional mandate to make their operations "self-sustaining to the full extent possible." 31 U.S.C. 483.[6] Moreover, the approach of the court below con-

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[6] As we have noted (pp. 6-7, *supra*), congressional appropriations committees since the enactment of Title V have urged federal agencies in general and the Federal Power Commission in particular to revise their fee and charges schedules to recoup more nearly the costs of administering their programs. The Commission's annual charges here under review were noted with approval by the chair-

flicts with the approach of the Fifth Circuit in upholding the annual assessments imposed by the Federal Communications Commission. *Clay Broadcasting Corp.* v. *United States,* 464 F.2d 1313 (reproduced in App. G, *infra,* pp. 63a-81a), petition for a writ of certiorari pending *sub nom. National Cable Television Association* v. *United States, et al.,* No. 72-948. Accordingly, review of the decision below by this Court is warranted to resolve an important question of federal law and to remove the uncertainty which now exists over the extent of the authority of federal agencies under Title V to establish fees and annual charges.

1. Under Title V, federal agencies are authorized to prescribe fees or charges for "any work, service * * *, benefit, privilege, * * * or similar thing of value or utility" performed or provided for "any person." Nothing in the statute suggests that where regulatory activity benefits an entire industry, the costs of providing those benefits to regulated companies cannot be ap-

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man of a House appropriations subcommittee during hearings on appropriations for 1972:

> At this point, Mr. Chairman [Nassikas of the Federal Power Commission], may I state that over the years the Independent Offices Subcommittee on which I served, has urged not only the Federal Power Commission, but the Federal Communications Commission, the Securities and Exchange Commission and others to revise their rate schedules. Many of them have done that. * * * I think the FPC is doing a good job. They have raised their fee rate schedule to $17 million from $7 million and your revised estimate for 1972 is $18,850,000. This will approach putting the FPC on a self-sustaining basis.

Hearings before a Subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess., on Public Works for Water and Power Development and Atomic Energy Commission Appropriation Bill, 1972, Part 3, pp. 1164-1165.

portioned among those companies. Nor does the reference in Bureau of the Budget Circular No. A-25 to an "identifiable recipient" (App. F, *infra*, p. 61a) foreclose agencies from charging for industry-wide benefits. For example, there is nothing obscure about the identification of the recipients of the regulatory benefits described by the Commission in its order in this case; each public utility and each natural gas company are recipients. Accordingly, the court below erred in holding that the Commission could not impose charges for benefits bestowed on the electric power and natural gas industries.

Title V also provides that all fees and charges should be fair and equitable taking into account "direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts." Nothing in this language suggests that charges may not be imposed merely because regulation benefits the public in addition to members of the regulated industry; it is axiomatic that all federal regulation is ultimately for the benefit of the public.

In finding that the Commission's annual charges were unauthorized by Title V, the court below relied (App. A, *infra*, pp. 8a-9a) on the statement in the Bureau of the Budget circular that no charges should be made for regulatory services that can be "primarily considered as benefitting broadly the general public" (App. F, *infra*, p. 62a). But this statement must be read in conjunction with the earlier statement in the circular that charges should be imposed for benefits to identifiable recipients "above and beyond those which accrue to the public at large" (*id.* at 61a). The appro-

priate test under the statute and under the circular is not whether the public benefits from regulatory activities, but "whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by" the federal agency. *Clay Broadcasting Corp.* v. *United States, supra* (App. G, *infra*, p. 79a).

The Federal Power Commission's order establishing annual charges identifies specific benefits accruing to electric utilities and natural gas companies from Commission regulation different from those which accrue to the public at large (see pp. 9-10, *supra*).[7] The Commission's establishment of a uniform accounting system, for example, while ultimately benefiting the public, has made possible the rapid growth of the electric power and natural gas industries. As one writer has noted (Priest, 1 *Principles of Public Utility Regulation* 39 (1969)):

> It must now be said, as a matter of hindsight, that the stringent accounting regulation enforced by the FPC was not only in the public interest, but also in the best interests of the operating companies concerned. What had been dubious items—at least in the light of the new morality—were eliminated from books of account and capital structures became clean, trim and sound. It is questionable

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[7] *Cf. Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, where the Court pointed out the conflicting interests investors and consumers have in the ratemaking process and impliedly recognized that rate regulation can benefit both regulated companies and the general public.

whether the electric utility industry would have been able to raise the more than fifty billion dollars which it has required for postwar expansion if these accounting reforms had not been made.

In short, the court below took an unduly narrow view of Title V of the Independent Offices Appropriations Act, 1952, in prohibiting the Commission from assessing annual charges in return for substantial and tangible benefits bestowed on the members of the regulated industries through the Commission's economic regulatory activities.

2. In *Clay Broadcasting Corp.* v. *United States, supra,* the Fifth Circuit upheld a schedule of fees and annual assessments, applicable to radio and television broadcasters and cable television ("CATV") operators, adopted by the Federal Communications Commission under Title V. The court noted that both broadcasters and CATV systems receive benefits from FCC regulation. Broadcasters receive the right to operate on a portion of the public's electromagnetic spectrum, are protected against technical interference and are part of a FCC controlled market structure which permits them to operate at a profit (App. G, *infra,* p. 70a). CATV operators, of course, use the broadcast signals protected and licensed by the FCC and the relative scarcity of television outlets creates much of the economic value of CATV systems; the systems are also benefited by FCC rules restricting the ownership of CATV systems by television stations and networks and stand to benefit from proposed rules which would limit

the amount of franchise fees which local governments could charge CATV operators (*id.* at 78a-79a).[*]

The nature of the FCC's regulation of the broadcast and CATV industries is sufficiently different from the nature of the Federal Power Commission's regulation of the electric power and natural gas industries to make detailed comparison of the respective benefits bestowed by the different regulatory agencies difficult; *Clay Broadcasting* and the decision below are thus distinguishable on their facts. The approaches of the two courts in applying Title V, however, are diametrically opposed. The court below struck down annual charges on the grounds that only industry-wide benefits are conferred and that the public is the principal beneficiary of the Federal Power Commission's regulatory activities; the Fifth Circuit, on the other hand, gave full recognition to industry-wide benefits as a foundation for charges under Title V and held that charges could be imposed where members of an industry benefit from regulation "in a manner different from the public at large" (App. G, *infra*, p. 79a). In our view, the Fifth Circuit adopted the correct legal standard.

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[*] The petition for a writ of certiorari of the National Cable Television Association (No. 72-948) challenges only the portion of the Fifth Circuit's decision which upheld the FCC's assessment of annual charges against CATV operators.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1973.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1439

NEW ENGLAND POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 71-1539

INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

No. 71-1555

TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Petitions for Review of Order of the Federal Power Commission

Decided August 15, 1972

Before TAMM, ROBB and WILKEY, *Circuit Judges.*

TAMM, *Circuit Judge*: In this case several representatives of the natural gas pipeline and electric industry petition the court to review and set aside Federal Power Commission Order No. 427 revising existing fee schedules for filing applications under the Natural Gas Act and Federal Power Act and assessing annually the costs of administering these programs against jurisdictional companies in accordance with formulae set forth in the order. Petitioners attack both the Commission's authority to impose the fees in question and the methods employed by the Commission in allocating the fees and charges. Since it is our view that the Commission lacked statutory authority to act, we pretermit consideration of the latter issue and accordingly grant petitioners the relief they seek.

I. *The Order*

On March 18, 1971, the Commission issued Order No. 427, which (a) revised a schedule of filing fees originally promulgated in a 1966 rulemaking proceeding [1] for certain applications by natural gas companies pur-

[1] Order No. 317, 35 F.P.C. 30. The 1966 order stated that applications seeking specific authorizations required by the Natural Gas Act must be accompanied by a nominal $50 filing fee. Furthermore, fees were imposed for pipeline applications for certificates of public convenience and necessity based upon the higher of the estimated or actual cost of particular pipeline projects.

suant to the Natural Gas Act;[2] (b) established for the first time a schedule of filing fees for various applications and rate schedule filings made by electric utilities pursuant to Parts II and III of the Federal Power Act;[3] and (c) established, also for the first time, a system whereby the costs of administering Parts II and III of the Federal Power Act and the Natural Gas Act, not met by filing fees, will be annually assessed against jurisdictional companies in accordance with formulae set forth in the order. Petitioners do not complain of the increased filing fees under the Natural Gas Act nor of the new fees under the Federal Power Act, but, rather, the nub of their complaint goes to the annual charges assessed. We therefore must examine them in greater detail.

The Commission imposed two types of annual charges upon pipeline companies. The first type, denominated an "annual general charge," imposed only upon Class A and Class B pipeline companies,[4] is computed as follows: Initially, the Commission determines the cost of administering its pipeline programs, subtracting therefrom the revenues derived from its first flat filing and pipeline certificate fees. The resultant net cost is recorded against a particular Class A or B pipeline

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[2] 15 U.S.C. § 717 (1970) *et seq.*

[3] 16 U.S.C. § 824 (1970) *et seq.*

[4] Interstate natural gas pipeline companies are classified for accounting and reporting purposes in the Commission's Uniform System of Accounts according to the amount of their annual gas operating revenues as follows:

Class A—$2,500,000 or more
Class B—$1,000,000 to $2,500,000
Class C—$150,000 to $1,000,000
Class D—$25,000 to $150,000

based upon the ratio of it total jurisdictional gas deliveries to the total jurisdictional gas deliveries of all Class A and B pipelines. The second annual charge, denominated the "annual reserves added assessment," is imposed upon pipeline companies required to file an Annual Report—Total Gas Supply on FPC Form No. 15. The assessment is one-tenth of a mill for each Mcf of the new reserves certificated for a particular calendar year as shown on that particular pipeline's Form No. 15.

The annual charge imposed upon jurisdictional electric utilities is computed as follows: A determination is made for each year of the administration costs of the Commission's public utility regulatory programs (other than those associated with coordination and reliability) from which is deducted the costs associated with services rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act and the amounts received during the same period as filing fees. The "adjusted cost" is then assessed against each public utility in the proportion that the sum of the gross jurisdictional kilowatt hours it sells at wholesale and those it delivers under interchange power agreements bears to the sum of the gross jurisdictional sales by all public utilities. Furthermore, a determination is made of the Commisson's cost of administration associated with its coordination and reliability programs which is then assessed against each public utility in the proportion that the gross revenues of such company bears to the sum of the gross electric revenues of all public utilities.

The authority upon which the Commission relied in its order assessing the foregoing annual charges and

fees was Title V of the Independent Offices Appropriation Act of 1952.[5] In addition, the Commission now asserts before this court for the first time that it also bases its authority to act upon Section 16 of the Natural Gas Act[6] and Section 309 of the Federal Power Act.[7] We now turn to an examination of these statutes, the appropriate legislative history, the relevant administrative interpretations, and comparable statutes.

II. *Title V of the Independent Offices Appropriation Act of 1952*

A. *The Statute*

The Commission primarily bases its authority to impose the annual general charge upon Title V of the Independent Offices Appropriation Act of 1952, which provides in pertinent part:

> It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefore such fee, charge, or price, if any, as he shall determine to be fair and equitable

[5] 65 Stat. 290, 31 U.S.C. § 483a (1970).

[6] 15 U.S.C. § 717o (1970).

[7] 16 U.S.C. § 825h (1970).

taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . . .

The legislative history behind this proviso, a "rider" to the appropriations bill, is sparse, but its purpose was made quite clear by the Report of the House Committee on Appropriations which we now set forth:*

> The Committee is concerned that the Government is not receiving full return from many of *the services which it renders to special beneficiaries.* Many fees for such services are specifically fixed by law, and in some cases, it is specifically provided that no fees shall be charged. In other cases, however, no fees are charged even though the charging of fees is not prohibited; and in still others, fees are charged upon the basis of formulae prescribed in law, but the application of the formulae needs to be re-examined to bring the actual charges into line with present-day costs and other related considerations.
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> . . . .
>
> The bill would provide authority for Government agencies to make charges for these services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. (Emphasis supplied).

As the foregoing legislative history makes clear,

* H.R. Rep. No. 384, 82nd Cong., 1st Sess. 2-3 (1952).

Title V was enacted to allow the agency to recoup costs from identifiable "special beneficiaries" where the services rendered inured to the benefit of special recipients not the general public. The statute has been consistently interpreted in this manner by the agencies of the executive branch of Government.*

B. *Agency Interpretation of Title V*

1. *Budget Circular No. A-25*

The standards and guidelines for application of Title V have been set forth by the Bureau of the Budget (now Office of Management and Budget) in Budget Circular No. A-25 of September 23, 1959, wherein the Bureau stated that a reasonable charge "should be made to each identifiable recipient for a measurable unit or amount of Government service or property from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . . . For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insur-

* Petitioners rely upon Aeronautical Radio, Inc. v. United States, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965), where the court upheld nominal filing fees upon certain types of radio license applications. However, in that case, unlike the instant one, the court was dealing with specific applications submitted to the Commission which conferred specific benefits upon the applicant.

ance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)."

However, the Circular states no charge should be levied for services rendered "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public."

The Commission urges that the annual charge comes within the terms of Circular No. A-25 because the charge relates to the cost incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and although such regulation "has provided continuing benefits to consumers," it has also

redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities

required for capital additions to meet ever-increasing demands.

The Commission has, however, missed the point. The creation of an "economic climate" is not a special service nor is a particular pipeline or gas company the "special beneficiary" of such a climate any more than any other pipeline, gas company or the consumer in general. Indeed, under the Commission's order petitioners would be liable for the annual assessment despite the fact that they had no proceedings before the Commission for that year. In effect then, the contemplated charges would have no relation to specific services or benefits rendered. The Commission must then fall back upon its "economic climate" argument which is obviously an overly broad benefit particularly in light of the requirement that the charges be for a "measurable unit of service." Furthermore, the statutory language—"to or for any person"—as well as the Budget Circular require an identifiable recipient. The Commission's inadequate response that the identifiable recipient is the whole industry assumes that each company receives a benefit directly proportional to revenue. This assumption is erroneous in that in any given year some companies may require substantial services from the Commission while others may neither require nor desire them.

In sum, we conclude that the regulation of these industries is primarily for the benefit of the public. Their charter statutes require them to so act. The courts have so held.[10] There is something fundamen-

[10] *See* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388-89 (1959); Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 610-12 (1944).

tally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public. In the absence of a clear Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. We are well aware of the burgeoning administrative expense of operating the Government, however, only Congress can give authority to levy these fees. It has not done so here.

2. *Federal Power Commission Order 317*

In Order 317, the original fee schedule imposed in 1966,[11] the Commission espoused a position precisely opposite from that which it now espouses, concluding that the charges at issue were general, and therefore without statutory foundation. We wholeheartedly concur in the Commission's earlier observation contained in the Notice of Proposed Rulemaking wherein the Commission stated:

> The Commission has reviewed its functions under . . . the Natural Gas Act and is of the opinion that the assessment of user charges or other fees with respect to the exercise of our regulatory activities under . . . the . . . rate and accounting provisions of the Natural Gas Act would not be appropriate since these activities are primarily for the benefit of the general public rather than the regulated companies.[12]

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[11] *See* note 1, *supra*.

[12] 30 Fed. Reg. 12077 (September 15, 1965).

III. *Section 16 of the Natural Gas Act & Section 309 of the Federal Power Act.*

The Commission asserts for the first time on appeal that it relies upon Section 16 of the Natural Gas Act [13] and Section 309 of the Federal Power Act [14] as au-

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[13] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

15 U.S.C. § 717o (1970).

[14] The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, and information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall

thority for Order 427.[15] Although we view this as "*post hoc* patchwork,"[16] we have considered and rejected the argument. Both sections are of an implementary rather than substantive character. The cases have made abundantly clear that while these provisions must be read in a broad expansive manner, they can only be implemented "consistently with the provisions and purposes of the legislation,"[17] and "that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the act."[18] These sections merely augment existing powers conferred upon the

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be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

16 U.S.C. § 825h (1970).

[15] The Commission's order does mention sections 16 and 309, however, not as substantive authority to prescribe fees, but merely as a point of reference to the source of the Commission's power to issue regulations implementing the basic grant of authority to charge the fees cataloged in Title V.

[16] Braniff Airways, Inc. v. Civil Aeronautics Board, 126 U.S.App. D.C. 399, 411, 379 F.2d 453, 465 (1967).

[17] Public Service Commission of New York v. Federal Power Commission, 117 U.S.App.D.C. 195, 198-99, 327 F.2d 893, 896-97 (1964).

[18] Niagara Mohawk Power Corp. v. Federal Power Commission, 126 U.S.App.D.C. 376, 381, 379 F.2d 153, 158 (1967) (footnote omitted).

agency by Congress,[19] they do not confer independent authority to act.

IV. *Comparable Statutes*

Putting aside Title V as authority for the order, it is highly significant that neither the Natural Gas Act nor Parts II or III of the Federal Power Act impose fees upon companies for regulation costs while Section 10(e) of the Federal Power Act explicity requires licensees thereunder to pay annual charges "fixed by the Commission for the purpose of reimbursing the United States for the costs of administ[ering]" Part I of the Act.[20] The Congress could have, but did not set forth a provision similar to section 10(e) in the statutory sections here under review. Furthermore, many states have adopted statutes which authorize the local regulatory agency to recover from companies subject to their regulation the costs of administration either on a fixed-fee basis for specific services or as a percentage of some measure of size or value.[21] While it is clear that legislatures have the authority to so act, it is equally clear that Congress failed to do so here.

V. *Conclusion*

For the foregoing reason the order of the Commission under review is set aside with respect to the annual charges levied against petitioners.

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[19] *See also* Mesa Petroleum Corp. v. Federal Power Commission, 441 F.2d 182 (5th Cir. 1971).

[20] 16 U.S.C. § 803(e) (1970). *See also* 16 U.S.C. § 803(f) (1970).

[21] Subcomm. on Intergovernmental Relations of the Senate Comm. on Operations, 90th Cong. 1st Sess., State Utility Commissions 22 (Comm. Print September 11, 1967).

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1971

No. 71-1439

New England Power Company, Petitioner

v.

Federal Power Commission, Respondent

No. 71-1539

Independent Natural Gas Association of America, Petitioner

v.

Federal Power Commission, Respondent

No. 71-1555

Tennessee Gas Pipeline Company, Petitioner

v.

Federal Power Commission, Respondent

PETITION FOR REVIEW OF ORDER OF THE FEDERAL POWER COMMISSION

Before:
TAMM, ROBB, and WILKEY, Circuit Judges

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the Commission under review is set aside with respect to the annual charges levied against petitioners, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court:
Hugh E. Kline
Chief Deputy Clerk

Dated: August 15, 1972
Opinion by Circuit Judge Tamm

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1972

No. 71-1439

New England Power Company,
Petitioner

v.

Federal Power Commission, Respondent

No. 71-1539

Independent Natural Gas Association
of America, Petitioner

v.

Federal Power Commission, Respondent

No. 71-1555

Tennessee Gas Pipeline Company,
A Division of Tenneco Inc.,
Petitioner

v.

Federal Power Commission, Respondent

Before: Tamm, Robb and Wilkey, Circuit Judges.

ORDER

On consideration of respondent's petition for rehearing, it is

ORDERED by the Court that respondent's aforesaid petition is denied.

Filed: September 25, 1972.

Per Curiam
For the Court:

HUGH E. KLINE
Clerk

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

[18 CFR, Parts 3, 11, 32, 33, 34, 35, 36, 45 and 159]

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr., and
Albert B. Brooke, Jr.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

ORDER NO. 427

ORDER AMENDING PART 3 — GENERAL POLICY AND INTERPRETATIONS, AMENDING PARTS 11, 32, 33, 34, 35 AND 45, AND ADDING PART 36 — REGULATIONS UNDER THE FEDERAL POWER ACT — AND AMENDING PART 159 — REGULATIONS UNDER THE NATURAL GAS ACT

(Issued March 18, 1971)

On November 25, 1970, the Commission issued a Notice of Proposed Rulemaking in this proceeding (35 F.R. 18324, December 2, 1970) proposing to amend its general rules and regulations under the Federal

Power Act and the Natural Gas Act to revise the schedules of fees at present imposed in connection with the filing of certain applications by natural gas companies and to establish new schedules of fees and annual charges to be applicable to electric utility companies and natural gas companies.

Responses were received (exclusive of requests for additional time within which to submit comments [1]) on behalf of 62 [2] companies and two industry associations raising questions as to the meaning of certain provisions, suggesting modifications for clarification or on the merits, objecting to the amounts proposed for certain of the services in the noticed schedules of fees and generally questioning the propriety of imposing annual assessments for services rendered in the administration of both Acts or the basis upon which they would be computed. A number of these comments have provided the basis for clarifying this rulemaking and others which have been called to our attention have resulted in revisions incorporating recommendations that will avoid inequities that might otherwise have occurred. The remaining comments and recommendations were considered and those which have been found lacking in merit or not necessary are not discussed in the order herein adopted.

Section 36.1 as proposed clearly stated the Commis-

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[1] The notice invited the submission of data, views, comments and suggestions in writing by no later than December 18, 1970; however, by notices issued December 16, 1970 (35 F.R. 19641, December 25, 1970) and January 22, 1971 (36 F.R. 1487, January 30, 1971), the time to do so was extended ultimately to February 5, 1971.

[2] Those responding to the invitation for comments are listed in an appendix attached hereto.

sion's aim that annual assessments covering the balance of the expenses incurred in the administration in each fiscal year of Parts II and III of the Federal Power Act above those recovered by the proposed fees for specified filings be based on gross electric revenues. We proposed that the allocations be based on gross rather than jurisdictional (electric) revenues because of the benefits deriving from our services (both regulatory and involving reliability) since both have direct and substantial impact on the stability and operations of public utilities regardless of the amount of their revenues derived from jurisdictional sales. However, we recognize the jurisdictional sales for resale of many public utilities are relatively small compared to their total revenues and that inequities would result if assessments covering all programs under Parts II and III of the Federal Power Act were based entirely on gross revenues. Accordingly, we have revised this section to provide that the residual costs of administration of our regulatory programs should be allocated on the basis of jurisdictional business but that the costs relating to our coordination and reliability programs which have impact on the total business of the utilities, whether or not jurisdictional, should be allocated on the basis of gross revenues. For the reason above stated, similar revision has been made in Section 159.2a regarding the allocation of assessments among natural gas companies. As revised such companies will be required to pay annual charges covering the residual costs of those programs on the basis of their jurisdictional business whether stemming from sales for resale, transportation of natural gas for others, or both. Other changes in Sections 36.1 and 159.2a have been

made for purposes of clarification based on the numerous comments we have received.

We have adopted suggestions that the fees prescribed in connection with the merger or consolidation of facilities be based on a sliding scale instead of a fixed fee. Our design of the fee schedule contemplated a charge of $10,000 for mergers of Class A, Class B utilities or both Class A and B utilities; the mere acquisition of facilities not constituting a merger or consolidation of such utilities, such as the acquisition of a transmission line having a value in excess of $50,000, would have been covered under Section 36.2 (c), as proposed, involving a fee of $500. But this amount would have been payable not only by the applicant disposing of the property but also by the one acquiring it. Instead, we are removing possible ambiguity and providing a more equitable schedule by requiring payment of a fee, not to exceed $10,000, based on the value of property transferred, as has been proposed. We are also adopting the suggestion that the requisite fee payable upon the filing of applications for the acquisition and disposition of facilities which involve several jurisdictional utilities should be split among them on the theory both the acquiring and disposing utility derive benefit from the transaction. In order to avoid any imposition of charges upon non-jurisdictional companies, however, the charges applicable to jurisdictional companies shall be at the rate of 1/2 percent of the value of facilities acquired and disposed of but not exceeding $5,000 as to each. A non-jurisdictional company acquiring facilities from or disposing of assets to a jurisdictional company will neither be charged nor

the costs of such services be borne by the utilities subject to our jurisdiction.

Some filings for rate increases are very small. In such cases a fee of $500 would be inequitable. However, administrative analysis is required regardless of the amount of the increase and it is conceded that a reasonable fee should be imposed for these services. We have accordingly revised proposed Section 36.2 (g) to provide for payment of a flat fee of $100 for increases of less than $5,000, if in sum they constitute no more than one percent of the total charges then in effect with respect to the purchasers affected by such filing. The second requirement is based on our experience that a rate increase though small will necessitate a more thorough evaluation if it constitutes more than a very minor part of the total charges to the customers involved. Where both requirements for the minimum fee are not met, the filing fee will remain at $500 which will also apply to increases from $5,000 to $50,000. Objections to a scaled fee for increases of $50,000 or more are not well taken, since generally our input of services varies directly with the amount of the increases we are required to review. These changes have been made in Section 36.2 (g).

The suggestion that filings for rate increases made under multi-party agreements involving several utilities should be exempt from fee requirements is without merit. The Commission's staff is obligated to evaluate such agreements where filing is required and if they involve rate increases Commission services should not be rendered without charge.

Several responding parties suggested the incorpora-

tion of provisions for refunds of various dimensions. The underlying purpose in adopting these fee schedules is to provide for the recoupment to the Treasury for the value of services rendered. Applications which may ultimately be denied in whole or in part after staff review and analysis involve the services of the Commission which should be subject to fee charges within the intent of our underlying authority. There is no valid basis for refund in those circumstances. Similarly, the payment of a fee based upon a filing of a rate increase which is ultimately found or conceded to be excessive should not justify a partial refund.

We adopt the suggestion that if an application or filing is withdrawn or rejected as insufficient or for some other reason not involving the input of substantial staff services, the fee should be refunded. If rejection occurs after considerable expenditure of staff time, there is no justification for refund. Accordingly, we have provided for refund in those cases if the filing has been withdrawn or found deficient and rejected. Under our procedures rejection must occur within 30 or 60 days depending on the type of filing; in that time staff effort will not have been cumulatively large. We have also clarified the status of amended filings in regard to fee requirements and filings for which more than one fee might be payable under these regulations. See Section 36.3.

Two recurrent objections to the proposed regulations require comment. The first, that the Commission does not have authority to charge fees except for and to the extent of the actual cost of specific services rendered has already been considered and was covered by our

discussion in the notice of rulemaking issued in this docket. Congress has by statute vested authority in all agencies of the federal government to prescribe fees or charges for services conferring benefits on persons subject to their jurisdiction so as to render such agencies as fully self-sustaining as possible. The pertinent provision which is included in Title V of the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 USC 483a), reads as follows:

> It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in case of any existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy

or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: *Provided,* That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: *Provided further,* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price.

Pursuant to such statute and to recommendations made at hearings before Congressional appropriation committees, we established by order our first schedule of fees (apart from those under Part I of the Federal Power Act) which were payable in connection with applications filed by natural gas pipeline companies for certificates of public convenience and necessity and for other authorizations as especially beneficial to the recipients of the services rendered in their processing. Order 317, 31 F.R. 430, January 13, 1966, as amended by FPC Order 317-A, 31 F.R. 4890, March 24, 1966, Part 159 of the Commission's Regulations Under the Natural Gas Act, 18 CFR, Part 159.

Congressional appropriation committees have since requested further review of our fee schedules with a view to making increases or adjustments to offset in part the increasing needs for direct appropriations for agency operating expenses. S. Rept. No. 1375, 90th

Cong., 2d Sess.; H. Rept. No. 1348, 90th Cong., 2d Sess. More recently, the Chairman of the Subcommittee on Independent Offices and Department of Housing and Urban Development of the Committee on Appropriations of the House of Representatives requested us to review our rate and fee structures with a view to charging gas and utility companies enough to sustain our administrative operations. Hearings, Independent Offices and Department of Housing and Urban Development Appropriations for 1971, 91st Cong., 2d Sess., Part 2, p. 951.

Moreover, we noted that in developing these schedules we have endeavored to adhere to the guidelines contained in Budget Circular No. A-25 by the imposition of charges "to each identifiable recipient for a measurable unit or amount of Government service . . . from which he derives a special benefit." These services include agency action which "provides special benefits . . . above and beyond those which accrue to the public at large . . ." or provides "more immediate or substantial gains or values . . . than those which accrue to the general public . . ." or provides business stability or assures public confidence in the business activity of the beneficiary . . ." or is "performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public . . .".

Costs directly allocable to a specific type of service rendered to specifically identifiable persons would be effected by charges directly related to that specific service. In determining the amount thereof we are not required to keep cost records on a case-by-case basis

but are authorized to average the costs involved in a particular service. *Aeronautical Radio, Inc.* v. *United States*, 335 F.2d 304 (CA7, 1964), certiorari denied, 379 U.S. 966 (1965). Our remaining proposed charges being of benefit overall to the members of both industries would be assessed on a measure of size against those within the ambit of our jurisdictional activities. We deem the allocation formulas we adopt herein to be both reasonable and a practical alternative to the development of a complex, extensive and costly accounting system whereby actual costs involved in each matter would be charged to the parties involved. Even such a system for basing charges would not in all circumstances be equitable since policies developed in prolonged proceedings involving one utility often become applicable to others at a minimum of additional administrative cost. We do not, after considering the content of the responses in this respect, find the comments sufficiently persuasive to require a change in the schedules for annual fees proposed and adopted herein.

We reject the contention that the proposed fees would constitute an illegal imposition of a tax inasmuch as we hold that the proposed charges constitute fees rather than taxes. The distinction between a tax and a fee has been clearly defined by the courts. The cases hold that:

A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered. *United States* v. *Butler*, 297 U.S. 1, 61 (1936); *Gumby* v. *Yates*, 214 Ga. 17, 102 S.E.2d 548,

550-551 (1958). A fee is a charge fixed by law for services of public officers or for use of a privilege under control of the government. *Fort Smith Gas Co.* v. *Wiseman,* 189 Ark. 675, 74 S.W. 2d 789, 790 (1934). A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society. *Stewart* v. *Verde River Irrigation & Power Dist.* 49 Ariz. 531, 68 P. 2d 329, 334, 335.

While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, we believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.

The question whether the proposed schedules constitute a tax is not affected by the method used in their assessment, i.e., whether in fixed amounts or varying in accordance with specified formulae. The proposed

charges were not authorized to impose exactions in the support of government in the general understanding of the term "tax", *United States* v. *Butler*, 297 U.S. 1, 61; *New Jersey Bell Telephone Co.* v. *State Board of Taxes*, 280 U.S. 338, 347, but would be in the nature of impositions "levied to reimburse the state or a subdivision thereof for services rendered rather than to provide public revenue . . ." 51 Am. Jur., Taxation § 20.[3]

The second objection made by a number of the responding parties is to the amounts projected to be recovered under the proposed fee schedules. In essence, those who have raised this contention state that the benefits of regulation should be borne in part by those who also benefit from the services rendered by the administration of both Acts who are not subject to regulation. These comments have merit. While we do not exercise jurisdiction over REA or municipally operated utilities, they do derive benefits from the services we provide under Parts II and III of the Federal Power Act. In this light it would be inequitable to have the privately owned utilities bear the cost of such services and we have accordingly revised Section 36.1 to reflect this change. (We had already excluded from our formula the costs associated with services rendered to other (including federal) agencies since we have not

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[3] State statutes designed to recover in part the costs of administration of their public service commissions either on a fixed-fee basis for specific services or as a percentage of some measure of size or value are not infrequent. See compilation in Committee Print prepared by the Subcommittee on Intergovernmental Relations of the Senate Committee on Operations, dated September 11, 1967, entitled, State Utility Commissions, 90th Cong., 1st Sess., p. 22.

incorporated in the costs to be assessed our expenses incurred in programs directed to servicing other agencies and the public.)

However, we do not agree that recoupment of part of the costs of all other services rendered to jurisdictional companies should be absorbed by the taxpayers generally since they primarily benefit the public utilities. The extension of the Commission's jurisdiction in 1935 to public utilities was prompted in substantial part by the deplorable practices of management which resulted in the collapse of the financial structures upon which the electric utility industry had been erected. The creation of regulatory agencies at the federal [4] level and the exercise of the powers delegated by the Congress to them have provided the foundation for the sound financial condition which public utilities and natural gas companies have achieved.[5] We recognize that the ex-

[4] Investigation of both the electric and gas industries by the Federal Trade Commission resulted in the grant of regulatory powers over public utilities. See Title II of the Public Utility Holding Company Act of 1935, 49 Stat. 838. Regulation of natural gas companies, though considered at the time that Act was adopted, was not authorized until 1938. 52 Stat. 821.

[5] A report issued by the Commission in 1950 discussed industry-wide recognition of the benefits accruing from only one facet of the Commission's activities—the adoption of a uniform accounting system. Typical of the comments made was the following in a publication issued by a prominent member of the New York Stock Exchange:

> "A great measure of the improvement in the financial position of the electric utilities has been due to the strengthening of regulatory controls by the Federal Power Commission, and particularly to the enforcement of the new uniform system of accounts.

A trade publication editorialized that

> "At no time in the past twenty years has the electric utility

ercise of our responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial has provided continuing benefit to consumers, but our actions in this respect have redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. In these circumstances we believe that our proposal which would make our operations as self sustaining as reasonably possible is consistent with statutory directives and is equitable, particularly since the charges involved can ultimately be passed on by these companies to their customers as expense properly includable among items upon which their respective costs of service are based.

The view that the imposition of fees destroys the budgetary restrictions imposed upon agencies like the Federal Power Commission is misplaced since all receipts are payable into the United States Treasury and not available for our use. The Commission's spending power, whether or not such charges are imposed, is predicated on appropriations authorized by the Congress and is dependent solely on the determination of that body as to the funds needed for administration of the powers delegated to us.

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industry of this country been in as sound a position financially as it is today."

Report on the Reclassification and Original Cost of Electric Plant of Public Utilities and Licensees, Federal Power Commission, 1950, pp. 19-20.

These regulations will become effective July 1, 1971. The filing fees will become payable on all applicable filings made after that date and assessments for the costs of administration of the Commission's programs will be made as soon after the close of its fiscal year ending June 30, 1971 as is practicable, except that annual charges relating to the Commission's public utility and natural gas pipeline regulatory programs will be computed and assessed for the first time for the Commission's fiscal year ending June 30, 1972.

The Commission finds:

(1) That the notice and opportunity to participate in this rulemaking proceeding with respect to the matters presently before this Commission through the submission, in writing, of data, views, comments and suggestions in the manner as described above, are consistent and in accordance with all procedural requirements therefor as prescribed in Section 553 of Title 5 of the United States Code.

(2) That the revisions herein made to the amendments proposed in the notice of rulemaking do not impose a further burden on persons subject to these regulations, do not constitute a substantial departure from the original proposal, and are consistent with the prime purpose of this rulemaking; therefore further notice and opportunity for comment is unnecessary.

(3) Upon consideration of all relevant matters presented, including the arguments, contentions, suggestions and other views expressed in the comments received and having determined that a conference to discuss the proposed amendments was not required, we

further find that the amendments to the Commission's regulations adopted herein are necessary and appropriate for carrying out the provisions of the Federal Power Act, the Natural Gas Act, and the Independent Offices Appropriations Act for the Year Ending June 20, 1952.

The Commission, acting pursuant to the provisions of the Federal Power Act, particularly Section 309 (49 Stat. 858, 16 U.S.C. 825h), the Natural Gas Act, particularly Section 16 (52 Stat. 830, 15 U.S.C. 717o), and the Independent Offices Appropriations Act for the Year Ending June 30, 1952 (65 Stat. 290, 31 U.S.C. 483a), *orders:*

(A) Part 3, Subchapter A, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of Part 3 is amended by inserting the words "Miscellaneous Charges," immediately preceding the words "Ethical Standards". As so amended the title of Part 3 reads as follows:

PART 3 — ORGANIZATION: OPERATION: INFORMATION AND REQUESTS; MISCELLANEOUS CHARGES; ETHICAL STANDARDS.

2. Sec. 3.102, Public information, requests, and assistance, is amended by revising the section title and by revising paragraph (b) to read as follows:

§ 3.102 Public information, requests, and assistance; miscellaneous charges.

* * * * *

(b) During the Commission's regular business hours, the public may examine in the Office of Public Information in Washington, D. C., copies of public information filed with the Commission. Photo copies of public material may be obtained through the public reference room. Fees charged for such copies are established by an annual contract between the Commission and a private company which does the work. Current schedules of fees for copying work are available from the Office of Public Information. Except for requests made by government agencies certification of copies of any official Commission record shall be accompanied by a fee of two dollars. Inquiries and orders may be made to that office personally, by telephone, or by mail.

(B) Subchapter B—Regulations under the Federal Power Act, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of "Part 11—Annual Charges" is revised to read as follows:

PART 11—ANNUAL CHARGES UNDER PART I OF THE FEDERAL POWER ACT

2. In "Part 32—Interconnection of Facilities; Emergencies; Transmission to Foreign Country.", the section titles and introductory clauses of §§ 32.1 and 32.51 and the introductory sentence of § 32.22 are revised to read as follows:

§ 32.1 Contents of application; filing fee.

Every application under § 202 (b) of the

Act shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall set forth the following information:

* * * * *

§ 32.22 Application for permanent connection for emergency use; contents; form and style; filing fee; number of copies.

Application for Commission approval of a permanent connection for emergency use only shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall conform with the requirements of §§ 32.1 to 32.4, inclusive, and, in addition, shall state in full the reasons why such permanent connection for emergency use is necessary in the public interest.

§ 32.51 Contents of application; filing fee.

Every application shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall set forth in the order indicated, the following:

* * * * *

3. In "Part 33—Application for Sale, Lease, or Other Disposition, Merger or Consolidation of Facilities, or for Purchase or Acquisition of Securities of a Public Utility", the title and introductory clause of § 33.2 are revised to read as follows:

§ 33.2 Contents of application; filing fee.

Each such applicant shall set forth in its application to the Commission, which shall be

accompanied by the fee prescribed in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which should, insofar as possible, be furnished as to said applicant and each company whose facilities or securities are involved:

* * * * *

4. In "Part 34—Application for Authorization of the Issuance of Securities or the Assumption of Liabilities", the title and introductory clause of § 34.2 are revised to read as follows:

34.2 Contents of application; filing fee.

Every such applicant shall set forth in its application to the Commission, which shall be accompanied by the fee prescribed in Part 36 of this Subchapter, in the manner and form and in the order indicated, the following information which, in the case of the assumption of a liability, shall be furnished as to both the issuer and the person assuming liability:

* * * * *

5. In "Part 35—Filing of Rate Schedules", between the heading "Application" and the section title "§ 35.1 Application; obligation to file rate schedules", a new "§ 35.0 Filing fees", is added which reads as follows:

§ 35.0 Filing fees.

Every filing made under this Part shall be

accompanied by the fee described in Part 36 of this Subchapter.

6. Immediately following Part 35, a new "Part 36—Annual Charges and Fees" is added which reads as follows:

PART 36—ANNUAL CHARGES AND FEES UNDER PARTS II AND III OF THE FEDERAL POWER ACT

§ 36.1 Annual charges.

Reasonable annual charges shall be assessed by the Commission against each public utility to reimburse the United States for such costs of administration of Parts II and III of the Federal Power Act as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's public utility regulatory programs (other than those associated with coordination and reliability) from which shall be deducted the allocable costs associated with services primarily rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act and the amounts received during the same period pursuant to the provisions of § 36.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (a) of

this section shall be assessed against each public utility in the proportion that the gross jurisdictional kilowatt hours sold and kilowatt hours delivered under interchange power agreements by such public utility in the calendar year terminating in such fiscal period bear to the sum of the gross jurisdictional kilowatt hours sold and kilowatt hours delivered under interchange power agreements by all public utilities for the like period.

(b) A determination shall be made for each fiscal year of the costs of administration of the Commission's coordination and reliability programs from which shall be deducted the allocable costs associated with services primarily rendered to or for the benefit of electric systems which are not public utilities as defined in the Federal Power Act. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (b) of this section shall be assessed against each public utility in the proportion that the gross electric revenues of such public utility in the calendar year terminating in such fiscal period bear to the sum of the gross electric revenues of all public utilities for the like period.

(c) Annual charges assessed under this

section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

§ 36.2 Filing fees.

A filing fee in the amounts set forth below shall accompany each of the following:

(a) Applications for physical connections $150

(b) Applications for the construction of border facilities $150

(c) Other corporate applications authorized by these regulations under the Federal Power Act $500

The provisions of this paragraph shall not apply to:

(1) applications under Part I of the Federal Power Act which are subject to the fees prescribed in Part 11 of these regulations,

(2) applications for the acquisition by merger or consolidation or the disposition by sale, lease or otherwise of electric facilities which are subject to the fees prescribed in paragraph (d) of this section, and

(3) applications for authority to hold interlocking positions which are subject to the fees prescribed in paragraph (h) of this section.

(d) Applications by a public utility for the acquisition by merger or consolidation, directly or indirectly, of electric facilities

of another person or for disposition by sale, lease or otherwise of electric facilities to another person ..... ½% of the value of such facilities, but not exceeding $5,000

(1) The fee prescribed by paragraph (d) of this section shall be shared by the public utilities acquiring and disposing of such facilities proportionately to the value of such facilities acquired or disposed of; the entire fee shall be paid by a public utility acquiring or disposing of such facilities from or to a person not a public utility.

(e) Nominal rate schedule filings voluntarily filed other than those involving rate increases $100

(1) Examples of such filings include schedule changes having minimal impact on the operations of a public utility such as those providing service to an additional delivery point, changes in maximum obligation to serve, changes in minimum billing demand not affecting billings, changes in service rules or regulations not affecting billings, extensions of terms of contracts or continuation of service, cancellation of rate schedules where service is no longer needed, changes in delivery voltages or metering voltages, changes in contract provisions not affecting

service, rates or billings, and adoption of initial rate schedules containing rates identical to rates applicable to the same customer class previously accepted for filing.

(f) Moderately complex rate schedule filings voluntarily filed $500

(1) Examples of such filings include schedule changes presenting more complex administrative problems such as those involving interconnection agreements, pooling agreements and additional large-scale sales.

(g) Rate schedule filings involving rate increases (computed on an annual basis) in excess of charges for the 12-month period preceding the proposed effective date thereof, as follows:

(1) Nominal rate increases:

(i) Schedule changes involving increases in rates totalling less than $5,000 and one percent of the total charges to the persons to be affected thereby $100

(ii) Schedule changes involving increases in rates totalling less than $5,000 but not subject to the filing fee provided in subdivision (i) of this subparagraph and those involving increases in rates of $5,000 or more but not less than $50,000 ..... $500

(2) Rate increases other than those covered under subparagraph (1) of this paragraph:

(i) One percent of the amount of such increases up to but not exceeding $1 million;

(ii) $10,000 plus ½ percent of the amount of such increases in excess of $1 million and not exceeding $10 million;

(iii) $55,000 plus ¼ percent of the amount of such increases in excess of $10 million.

sitions $100

(h) Applications to hold interlocking positions $100

§ 36.3 Miscellaneous

(a) Annual assessments and fee payments shall be made by check or money order to the Treasurer of the United States. No fees will be refunded unless within sixty days of the filing of an application or rate schedule filing in connection with which such fees have been paid such application or rate schedule filing has been voluntarily withdrawn by the applicant or rejected by the Commission as incomplete or for some other reason.

(b) An application or rate schedule filing submitted for the sole purpose of amending a pending application or rate schedule filing need not be accompanied by a fee in addition to that which accompanied the original submission, provided that if the later application or rate schedule filing would have upon initial filing required payment of a larger fee, such refiling shall be accompanied by an amount equal to the difference between both fees.

(c) Where an application or filing seeks Commission authorization in the alternative or would otherwise be subject to the payment of more than one filing fee, only the highest fee shall be required.

§ 36.4 Accounting for fees paid pursuant to this Part.

A public utility subject to the provisions of this Part shall account for the assessments and fees paid by charging the amounts thereof to Account 928, Regulatory commission expenses.

7. In "Part 45—Application for Authority to Hold Interlocking Positions", the title and introductory clause of § 45.8 are revised to read as follows:

§ 45.8 Contents of application; filing fee.

Each application shall be accompanied by the fee prescribed in Part 36 of this Subchapter and shall state the following:

* * * * *

(C) Part 159, Subchapter E—Regulations under the Natural Gas Act, Chapter I, Title 18 of the Code of Federal Regulations is amended as follows:

1. The title of "Part 159—Fees for Certain Applications Filed Pursuant to the Natural Gas Act" is revised to read as follows:

PART 159—FEES AND ANNUAL CHARGES UNDER THE NATURAL GAS ACT

2. In § 159.2 Applications involving construction or acquisition of facilities, paragraphs (a), (b) and (d) are revised to read as follows:

§ 159.2 Applications involving construction or acquisition of facilities.

* * * * *

(a) Within 30 days following issuance of notice of application, an amount equal to 65/1000 of 1 percent (0.00065) of the estimated cost of construction of new facilities or of facilities to be acquired;

(b) Within 30 days following grant of the certificate, an amount equal to 130/1000 of 1 percent (0.00130) of the estimated cost of construction of new facilities or of facilities to be acquired, unless applicant does not accept the certificate.

* * * * *

(d) If the actual cost of construction of new facilities or of facilities to be acquired exceeds the estimated cost thereof, the statement of actual cost, required to be submitted by § 157.20(c)(4) and (d)(3) of this chapter, shall be accompanied by an amount equal to 195/1000 of 1 percent (0.00195) of the excess of actual cost (plus estimated cost of facilities for which actual cost is not then recorded on the books of applicant) above estimated cost.

* * * * * *

3. Immediately following § 159.2, a new "§ 159.2a Annual charges" is inserted which reads as follows:

§ 159.2a Annual charges.

Reasonable annual charges will be assessed by the Commission against natural gas companies to reimburse the United States for costs of administration of the Natural Gas Act, as hereinafter provided:

(a) A determination shall be made for each fiscal year of the costs of administration of the Commission's natural gas pipeline programs from which shall be deducted the amounts received during the same period pursuant to the provisions of §§ 159.1 and 159.2 of this Part. The difference shall constitute the adjusted costs of administration of such programs for such period.

(1) The adjusted costs of administration determined under paragraph (a) of this section shall be assessed against each Class A and Class B natural gas company in the proportion that the total jurisdictional gas deliveries of such natural gas company in the calendar year terminating in such fiscal period bear to the sum of the jurisdictional gas deliveries of all Class A and Class B natural gas companies for the like period.

(b) In addition to the annual charges prescribed by paragraph (a) of this section, each natural gas company required to file an An-

nual Report—Total Gas Supply on FPC Form No. 15 shall be assessed one-tenth (1/10) of a mill for each Mcf of new reserves certificated during the year covered by said report as shown for item 14 of such form.

(c) Annual charges assessed under this section shall be paid within 60 days of the rendition of a bill therefor by the Commission.

4. In "§ 159.3 Miscellaneous", paragraph (a) is revised to read as follows:

§ 159.3 Miscellaneous.

(a) Method of payment. Annual assessments and fee payments shall be made by check or money order payable to the Treasurer of the United States. No fees will be refunded.

(D) The amendments herein adopted shall become effective July 1, 1971, except that annual assessments required to be paid under § 36.1 (a) and § 159.2a (a) of these regulations shall first be assessed for the calendar year terminating in the fiscal year of the Commission ending June 30, 1972.

(E) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission. Commissioner Carver concurring in part and dissenting in part filed a separate statement appended hereto.

(SEAL)

Kenneth F. Plumb,
Acting Secretary.

CARVER, Commissioner, *concurring* in part and *dissenting* in part:
(Issued March 18, 1971)

I agree that sound public policy as well as the specific requirements of the Independent Offices Appropriation Act, 1952 dictate that the use of public resources and facilities and the receipt of certain services and functions of the government be supported by user fees or charges assessed against those benefited. The order promulgated herein is therefore well founded, required by law and the rates established bear a reasonable relationship to the cost of the services involved, and I join in approving it, except as to that portion of it which adds Part 36, relating to Annual Charges and Fees under Parts II and III of the Federal Power Act.[1] I cannot concur in that part of the order, and the reasons for my dissent are stated briefly below.

As a basic philosophical premise, I do not believe that general governmental functions, unrelated to special services or privileges extended by the sovereign, should be made self-sustaining through levies upon particular persons or industries. Regulation in the public interest is conducted for the benefit of the general public; it ought to be financed out of the general fund of the Treasury in the same manner as other governmental functions.

It is a fiction that this part of the fee structure falls upon the regulated companies. All regulatory costs

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[1] I recognize that some part of the schedule of fees applicable to natural gas companies is subject to the objections specified to inclusion of Part 36. I have chosen not to try to differentiate the acceptable from the unacceptable, as not necessary for the objectives of this dissent.

are always includible in the cost of service, so that the incidence of these fees will fall upon the ratepayers. Although consumers of utility services are broadly representative of the total taxpaying public, it is notorious that utility rates are more favorably disposed toward the larger consumer. Thus, a heavier proportion of the fee burden will attach to those least able to pay. It is, in effect, a regressive impost which is contrary to the general tax philosophy at the Federal level.

To the extent that Part 36, added to our regulations by this order, attempts to recover administrative costs above and beyond those that have direct relation to a service rendered or privilege enjoyed (such as an annual charge on some *ad valorem* basis), it ceases to qualify as an authorized regulation establishing a fee structure. It is based on revenue requirements, rather than costs incurred or value received, and as such is more accurately defined as levying a tax. I find nothing in either the Federal Power Act or the Natural Gas Act, nor in Title V, Independent Offices Appropriation Act, 1952, which permits or requires us to levy and collect taxes.

The levy of an annual fee as a revenue measure is objectionable as bad public policy and is not legally sound.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR. Commissioner

APPENDIX

The following companies and industry associations filed responses to the invitation contained in the Notice of Rule-making in Docket No. R-408 (apart from those requesting additional time in which to do so):

Alabama Power Company
Algonquin Gas Transmission Company
Allegheny Power Service Corporation on behalf of seven public utilities
American Electric Power Service Corporation on behalf of seven public utilities
Arizona Public Service Company
Arkansas Power & Light Company
Carolina Power & Light Company
The Cincinnati Gas & Electric Company
Colorado Interstate Gas Company
Columbia Gas System Service Corporation
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power & Light Company of Maryland
Delmarva Power & Light Company of Virginia
Duquesne Light Company
Edison Electric Institute
Florida Power Corporation
Georgia Power Company
Gulf Power Company
Idaho Power Company
Illinois Power Company
Independent Natural Gas Association of America
Iowa-Illinois Gas and Electric Company
Iowa Southern Utilities Company
The Kansas Power and Light Company

Kentucky Utilities Company
Louisiana Power & Light Company
Michigan Gas Storage Company
Minnesota Power & Light Company
Mississippi Power Company
The Montana Power Company
Natural Gas Pipeline Company of America
New England Power Service Company on behalf of four public utilities
New Orleans Public Service Inc.
Otter Tail Power Company
Pacific Gas and Electric Company
Pacific Power & Light Company
Pennsylvania Power & Light Company
Philadelphia Electric Company
Phillips Petroleum Company
Public Service Electric and Gas Company
Puget Sound Power & Light Company
Southern California Edison Company
Texas Gas Transmission Corporation
United Natural Gas Company
Utah Power & Light Company
Washington Gas Light Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman,
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr.,
and Albert B. Brooke, Jr.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

ORDER DENYING REHEARING

(Issued May 14, 1971)

On November 25, 1970, we issued a Notice of Proposed Rulemaking in this proceeding (35 F.R. 18234, December 2, 1970) proposing to amend the general rules and regulations under the Federal Power Act and the Natural Gas Act to revise the schedule of fees proposed in connection with the filing of certain applications by natural gas companies and to establish new schedules of fees to be applicable to electric utility companies and natural gas companies.

We invited the submission of comments and suggestions by December 16, 1970, but pursuant to requests for additional time the return date was twice extended

ultimately to February 5, 1971. Responses on the merits were timely received from 62 companies and two industry associations raising questions as to the meaning of various proposed revisions of our regulations, suggesting modifications for clarification or in the policy underlying the proposed changes in fee requirements, and objecting on various grounds to the imposition of fees or assessments generally or as to specific items. The comments and recommendations were considered by the Commission and were in substantial part discussed in Order No. 427, which we issued on March 18, 1971, amending our regulations.

Two industry associations, Edison Electric Institute (EEI) and Independent Natural Gas Association of America (INGAA), and four companies, Montana Power Company (Montana), New England Power Company (New England), Southern California Edison Company (Southern California), and Tennessee Gas Pipeline Company (Tennessee), have filed a petition and applications for rehearing, three of them, EEI, Montana, Southern California, on the ground that a conference which the notice of proposed rulemaking stated could be requested was not provided. That notice did not state that a conference would be afforded responsive parties but invited "[s]ubmissions to the Commission [of data, views, comments, and suggestions, in writing] * * * and whether the person filing them requests a conference at the Federal Power Commission to discuss the proposed amendments." It stated also that the "Commission shall consider all such written proposals before acting on the matters herein proposed."

Neither the Administrative Procedure Act, 5 USC

553, nor our rules, nor the statutory authority upon which this action was taken require that conferences be held in connection with rulemaking proceedings of this kind. The only requirement relevant here is that after notice of proposed rulemaking, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments *with or without* opportunity for oral presentation * * *". (Emphasis supplied.) 5 USC 553(c).

It is our announced procedure that the Secretary or staff counsel upon the approval of the General Counsel and the Office or Bureau involved may call a public conference at which all parties who filed comments are invited to participate. As we show, the grounds in sum urged by these three responding parties were in substance previously asserted in their comments or in the comments of other responding parties and were considered by the Commission when the order was adopted. In these circumstances, we find no basis for holding that the staff abused its discretion in not scheduling a conference to discuss their objections.

EEI's application essentially amounted to a reiteration of the same grounds contained in the comments it had previously submitted and of which the Commission was apprised and which it considered when the order was issued. Its statement that it would have filed more comprehensive comments had it anticipated that a conference would not be held carries no weight since the purpose of a conference is to discuss the issues previously raised in the comments submitted in response to an invitation therefor in the notice of proposed rulemaking.

The contention (INGAA, New England, Southern California and Tennessee) that the amended regulations constitute a revenue measure and are violative of the Appropriation Act and Budget Circular A-25 on which they were based does not raise issues which were not fully considered when Order No. 427 was adopted, nor do the allegations of these petitioners suggest valid grounds for rehearing or reconsideration.

Montana and Southern California raise contentions regarding the fairness of the assessment of fees and charges on jurisdictional public utilities and licensees and upon nonjurisdictional revenues and further contend such fees and charges will be unlawfully borne by customers for services not subject to the Commission's jurisdiction. We initially proposed to collect fees and assessments for all the costs of administering Parts II and III of the Federal Power Act upon jurisdictional utilities, in part for specific services rendered in connection with prescribed applications and filings, and in remainder on the basis of the proportion that the gross revenues of each regulated company bears to the total gross revenues of all such companies. As a result of the comments and suggestions submitted we agreed that such allocation would be inequitable since the nature of our administrative activities regarding utility regulation and those concerned with coordination and reliability could not both be fairly attributed to gross revenues.

In the first place, the costs of our administrative activities properly allocable to municipal and other nonregulated systems for either group of programs should not and will not be charged to jurisdictional utilities; secondly, the balance of the costs of admin-

istering the regulatory functions (after deduction of fees obtained for specific applications and filings) will more equitably be based on transfers of jurisdictional energy since the quantum of our services more nearly varies with the sales and deliveries of such energy; and, finally, the costs incurred in the promotion of greater coordination and reliability, being system wide and beneficial to a utility without regard to its jurisdictional business, are fairly allocable on a gross revenue basis.

However, New England asserts that as compared to a vertically integrated public utility which normally sells a large percentage of its (nonjurisdictional) kilowatt hours to customers for consumption, the regulation adopted unfairly penalizes a generation and transmission company which supplies the entire (jurisdictional) kilowatt hour needs of its associate companies principally for distribution. We considered the objection submitted by New England to the allocation of all costs of electric administration on the basis of gross revenues in response to our invitation for comments and in acknowledgment of the unfairness of the provision made appropriate revision, as described above, to avoid making annual charges to cover the costs of public utility regulation on the basis of gross revenues.

We think further revision is not required. Where the associated companies are solely in the business of distributing electric energy not subject to Commission jurisdiction, no fees or other charges will be required of them and where they may have a limited amount of jurisdictional business the duplicative charges will be of little significance. In cases where jurisdiction attaches the services rendered which are subject to the

specific fee schedules set out in Section 36.2 will not be charged to utilities under the assessment provisions of Section 36.1. As to the remainder of the administrative costs of the regulatory programs (less that applicable to nonjurisdictional electric systems), the Commission's programs involve rate surveillance, accounting matters and formal proceedings including rulemaking matters. These activities are conducted for all jurisdictional utilities and we can think of no more equitable method of allocating those charges than on the basis of jurisdictional sales and deliveries of electric energy.

The jurisdiction conferred by the Federal Power Act is based on the transmission and sale at wholesale of electric energy in interstate commerce and were we to make allocations on a basis which exempted this applicant and others having the same corporate arrangement from their proportionate shares of the charges, such action would not be consistent with our responsibilities under that Act.

New England's contention that the inclusion of the costs of electric utility regulation will add to the cost of power which is interchanged and hence discourage coordination among utilities is recognized. However, we believe it will have no significant effect in view of the benefits accorded electric systems by the advantages interconnection provides in enhancing the reliability of service.

INGAA, Tennessee, and New England rely on dicta of the Commission in its notice of proposed rulemaking that culminated in the adoption of Order No. 317, as amended by Order 317-A, 31 F.R. 430, 4890, which added Part 159 to the Regulations under the Natural

Gas Act, as indicative of the Commission's lack of authority to broaden the scope of its charges to provide for the recoupment of certain costs of administration by assessment methods. We were mindful of these views but do not consider them binding upon us. These regulations, as our order pointed out, are predicated on the benefits accorded public utilities and natural gas companies by the creation of regulatory agencies at the federal level and the exercise of the powers delegated to them by the Congress which in our opinion satisfy the statutory requirements for the imposition of these charges.

INGAA's and Tennessee's objection to assessing pipelines for the cost of producer regulation is much too broadly put. The assessment is limited to only one of the various producer programs: the certification of producer sales which plainly benefit pipelines through the Commission's control of the initial prices they are required to pay producers for gas purchases. The Commission's activities in this connection which provide clear benefits to pipelines through regulatory action include the issuance of temporary certificates to expedite deliveries, the elimination of indefinite price escalation provisions, and the control over the quality of natural gas to be delivered and the length of the period in which supplies may be delivered where advance payments are made by the pipelines.

Both Tennessee and INGAA challenge the fairness of allocating charges on the basis of jurisdictional deliveries. One objection is that no part of the assessments are based on direct sales by pipelines to industrial customers which are nonjurisdictional. We point out that the entire costs of administering the pipeline

programs are not assessed on the basis of jurisdictional deliveries since a substantial part thereof are made up by certificate application fees filed in connection with the construction of pipeline facilities. In this way, a significant portion of expenses of administering the pipeline programs will be made up by payments for the installation of facilities to serve nonjurisdictional customers.

Another objection is that the method of allocation is unfair because it includes deliveries of natural gas between pipelines which, it is argued, sometimes involve double or triple counting of the same volumes of gas. While our method of allocation is somewhat imperfect, we think it is a reasonable method of allocating the portion of pipeline administration costs not obtained from certification of facilities and that it does not work a hardship on the pipelines. The fees paid in this connection by the pipelines form part of their lawful operating costs each pipeline may recover from the purchaser of their gas. More importantly, where several pipelines are involved seriatim in the delivery of the same volumes of gas, the regulatory responsibilities of the Commission are correspondingly increased.

Several of the applicants seek rehearing on the ground that there is no way to approximate the extent of the costs of regulation each utility or gas company will be obligated to pay. We do not think these objections meritorious. The basis for determining the fees to be charged in connection with miscellaneous matters, specified applications and filings, and assessments relating to new gas supplies are clearly set forth in Sections 3.102(b), 36.2, 159.1 and 159.2a(b) of the Regulations. The remaining assessments predicated on

the costs incurred in each fiscal year can be readily approximated from these sources: published data supplied by the Commission annually to the Congress in support of its request for appropriations which show the allocation to be made for each electric and gas program and information published by the Commission showing the gross revenues and sales and deliveries of electric energy by electric systems and jurisdictional sales of natural gas companies.

The Commission finds:

The assignments of error and grounds for rehearing and reconsideration set forth in the applications of EEI, INGAA, New England, Southern California and Tennessee and in the petition of Montana which were filed in this proceeding present no facts or legal principles which were not fully considered by us, or which now being reconsidered by us would warrant any change or modification of the Commission's Order No. 427, issued March 18, 1971.

The Commission orders:

The petition and applications for rehearing and reconsideration of Order No. 427 are denied.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

KENNETH F. PLUMB,
Acting Secretary.

Revision of Existing and Establishment of New Schedules of Fees to be Paid by Electric Public Utility Companies and Natural Gas Companies and for Miscellaneous Services Rendered by the Federal Power Commission	Docket No. R-408

(May 14, 1971)

CARVER, Commissioner, *dissenting:*

This order is addressed essentially to those portions of Order No. 427 which I found unacceptable in my separate opinion in that docket, leaving me no alternative but to dissent herein.

/s/ John A. Carver, Jr.
JOHN A. CARVER, JR., Commissioner

APPENDIX F

Bureau of the Budget Circular No. A-25 (1959) provides in pertinent part:

3. *General policy.* A reasonable charge, as described below, should be made to each identifiable recipient for a measureable unit or amount of Government service or property from which he derives a special benefit.

a. *Special services.*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a Government-rendered service:

(a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on a specific business); or

(b) Provides business stability or assures public confidence in the business activity of the beneficiary

(e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft); or

(c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours).

(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products).

APPENDIX G

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1621

CLAY BROADCASTING CORPORATION OF TEXAS,
PETITIONER,

VERSUS

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
RESPONDENTS.

No. 71-1990

NATIONAL ASSOCIATES OF BROADCASTERS,
PETITIONER,

VERSUS

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS.

Petitions for Review of an Order of the Federal Communications Commission (Texas Case)

(July 21, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

GEWIN, Circuit Judge: These consolidated petitions for review seek to set aside the revised schedule of fees of the Federal Communications Commission which became effective August 1, 1970.[1] The petitioners are representatives of the broadcasting and cable television industries and include several individuals and corporations which have interests in particular broadcast properties. While the contentions of the several parties vary widely the petitioners collectively present a broad challenge to the Commission's authority and the reasonableness of its order imposing the fees adopted July 1, 1970, *Schedule of Fees,* 23 F.C.C.2d 880, 35 Fed. Reg. 10988. Upon review we find that the revised fee schedule is a reasonable exercise of the authority delegated to the Commission by Congress.

The concept of user charges was explicitly authorized by Congress in Title V of the Independent Offices Appropriation Act of 1952.[2] The Federal Communica-

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[1] This Court has jurisdiction to review the Commission's order under 47 U.S.C. § 402(a) and 5 U.S.C. § 701 et. seq.

[2] "It is the sense of the Congress that any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any persons (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or rede-

tions Commission adopted its first fee schedule in 1963 covering all areas of Commission regulation at the time. Report and Order, *Fees*, 34 F.C.C. 811 (1963). That schedule was challenged before the Seventh Circuit Court of Appeals, which affirmed the Commission's order, *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965). Shortly thereafter the Commission announced a policy of keeping its fees schedule under continuing review. See *Fees*, 1 F.C.C.2d 1349 (1965).

On February 18, 1970, the Commission issued a Notice of Proposed Rule Making looking towards the broad revision of its fee schedule. *Schedule of Fees*, Docket No. 18802, 21 F.C.C.2d 502, 35 Fed. Reg. 3815 (1970). The Commission noted that Congress had urged that the activities of the Commission become more nearly self-sustaining and proposed a new schedule of fees which would generate estimated fees approximating the Commission's budgetary request for fiscal year 1971. These fees included increases in those areas which were already subject to at least nominal fees and proposed new fees in areas where the Commission had only recently exercised jurisdiction to regulate—community antenna television (CATV) and radio frequency equipment testing and approval.

In addition to levying application fees, the Commission proposed to give explicit recognition to the "value

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termine, in case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy, or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts. . . ."

31 U.S.C. § 483a (1971).

to the recipient" of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government by imposing fees relating to the value of the authorization of the license.[3] The Commission proposed fees for the grant of applications for assignment of a license or a transfer of interest in a broadcast station which reflected the value which the parties to the transaction placed on the sale. It also proposed an annual fee for broadcast stations based on the licensees' own commercial rates. In the CATV field the Commission proposed to tie the annual fee to the number of subscribers in each system.

After receiving a large number of comments from interested parties, the Commission adopted the revised Schedule of Fees on July 1, 1970. The document was officially released on July 2, 1970, *Schedule of Fees*, 23 F.C.C.2d 880, and was printed in the July 8, 1970 issue of the Federal Register, 35 Fed. Reg. 10988. As indicated in the earlier Notice of Proposed Rule Making[4] the revision abolished broadcast license renewal

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[3] ". . . [T] proposed fees are designed to make the Commission '• • • self-sustaining to the full extent possible • • •' in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the 'value to the recipient' of the privileges granted, as well as the public interest served and the direct and indirect cost to the Government. Therfore, in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, the new fee schedule adopts the concept of a separate fee reflecting our consideration of the 'value to the recipient' factor involved in authorization and licenses."

21 F.C.C.2d at 503-04 (1970).

[4] 21 F.C.C.2d at 507 (1970).

fees in favor of annual operating fees which amounted to 24 times a radio station's highest one-minute spot announcement rate, but not less than $52, and 12 times a television station's highest 30-second spot announcement rate, but not less than $144. The assignment and transfer fee to be paid immediately following the consummation of the transfer was set at 2% of the consideration paid. The new schedule was to be effective August 1, 1970 on all grants made on or after that date. The Commission however excepted from the grant fees those applications filed prior to July 1, 1970, the date of the adoption of the new schedule. The Commission levied an annual fee on CATV systems equal to $0.30 multiplied by the number of subscribers of the system.

Thereafter a number of petitions for reconsideration were filed with the Commission concerning various aspects of its fee schedule. These petitions, in so far as they are material to this case, were subsequently denied, 28 F.C.C.2d 139 (1971). All petitions for review of the Commission's fee schedule rulings, filed pursuant to 47 U.S.C. 402(a) in this and other circuits, have been transferred to this court and consolidated in this case. We consider each of the challenged fees in turn.

I. *Broadcast Annual License Fee*

The National Association of Broadcasters (NAB), a national trade organization with a substantial number of radio and television station members, seeks a review of both the annual license fee and the 2% grant fee on assignment and transfer applications. The NAB contends that the annual fee is in effect a *discriminatory tax* on radio and television. It acknowledges that the

Commission may impose fees upon the broadcast services and that the Commission is not limited to the imposition of nominal fees only. However the NAB contends this annual license fee is unreasonable because it reflects that the *Commission's concern was only with recovering the full amount of the agency's appropriation.* This, it contends, violates the statutory guidelines provided in the act which authorizes agency fees[5] that are "fair and equitable" taking into account: (1) the cost to the Government; (2) the value to the recipient; and (3) the public policy or interest served. It argues that not all of the Commission's activities in the broadcast section are of *specific benefit* to the stations. The Commission and the stations themselves expend a significant amount of time and effort *in activities which serve the general public at large.* But the NAB complains, "the fact is the schedule of fees for the broadcast services hands to commercial licensees *all* of the costs of commission activities in the broadcast field when in fact all of the services are *not* rendered for the benefit of commercial licensees."

In our judgment the NAB misconstrues the legal requirements which the Commission must meet in imposing fees and we believe that its position demonstrates a *myopic misconception of the "benefits"* which the Commission confers on commercial licensees. In the first instance, the weighing of these statutory factors or "whether * * * all * * * must play a quantitative share" in the judgment made, was for the Commission. *Aeronautical Radio, Inc. v. United States,* 335 F.2d 304, 309 (7th Cir. 1964) *citing Secretary of Agriculture v.*

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[5] 31 U.S.C. § 483a. *See* note 2 *supra.*

Central Refining Roig Co., 338 U.S. 604, 611, 612, 94 L.Ed. 381, 388, 389, 70 S.Ct. 403, 407 (1950). Additionally Bureau of the Budget Circular A-25 which provides "The maximum fee for a special service will be governed by its *total cost* and *not by the value of the service* to the recipient" *does not compel the Commission to precisely pro-rate its costs* in performing the various services in the Broadcast Bureau and limit the fee for each service to its precise administrative cost.[6] Indeed such precision would be difficult if not altogether impossible to achieve.[7]

The record indicates that the Commission estimated the direct and indirect costs of regulating the broadcast industry to be $9,661,200 or 38.8% of the Commission's fiscal year 1971 budget. 23 F.C.C. 2d at 882. After giving consideration to the other factors,[8] the Commission settled on a schedule in which the broadcast fees were

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[6] We find no merit in the NAB's contention that these fees are in reality an unlawful tax because the money involved is not approximately equal to the *amount of work* rendered by the Commission in behalf of the party against whom the charge is made. The Commission is clearly entitled to charge such fees to recover its costs as are fair considering the value to the recipient, public policy and other pertinent facts. 31 U.S.C. § 483a. By the very terms of the statute "value to the recipient" is not limited to the amount of work performed but also includes any ". . . . service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or other similar thing of value or utility. . . " *Id.*

[7] E.g., processing an application for increase in a station's power would appear to be a cost properly chargeable to both the applying station for expansion of its signal contour, and to those stations which might receive interference from the power increase for the protection of their signal contours.

[8] I.e., the "value to the recipient" and "public policy" factors. 23 F.C.C.2d at 882.

estimated to produce $9,600,000. That figure represented less than 0.3% of the approximately $3.5 billion gross revenues generated by the broadcast industry in 1968. In exchange, commercial licensees receive an exclusive right to operate for a profit on a portion of the public's electromagnetic spectrum. The Commission regulation of the broadcast industry generally provides individual licensees with continuing protection from technical interference as is consistent with the public interest and maintains the market structure which makes it possible for commercial broadcasting to operate at a profit. We therefore are unable to find that the Commission acted unreasonably or arbitrarily in imposing on commercial licensees an annual fee which is part of a schedule calculated to fully recover the direct and indirect costs of regulating the broadcast industry.[9]

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[9] We also find no merit to the NAB's contention that the Commission's fees are improper because they fail to take into consideration the large number of unprofitable stations. In the response to the petitions for reconsideration the Commission noted:

> "The Commission is keenly aware of the significant number of unprofitable broadcast stations and of the contention that the annual operating fees would cause a diminution of program services by broadcast stations, particular in the marginal and unprofitable stations. We would emphasize, however, that no evidence has been submitted in support of these assertions, and that since all broadcast licensees have established financial qualifications sufficient to carry on their broadcast operations, it is highly unlikely that the new fee schedule would constitute a significant burden in a broadcast station's total operation. * * * The Commission will, of course maintain a continuing review in this area, and if the facts indicate a change is necessary, appropriate revisions will be made. Meanwhile any license whose financial situation is such that the annual operating fees will cause a diminution of program service to the public, or otherwise materially affect his opera-

II. *Two Percent Grant Fee*

The NAB and a number of individuals with particular broadcast interests [10] also challenge the imposition of a fee of 2% of the consideration paid following consummation of the assignment of a license or transfer of control as approved by the Commission. 23 F.C.C.2d at 903. We find no merit to the NAB's contention that the 2% figure is arbitrary or unfair because it does not precisely reflect the different amounts of effort the Commission expends in considering the applications of varying complexity.[11] Furthermore, we are unable to accept its argument that the amount paid solely reflects the transferors' assets and good will, or its inference that the Commission has already been compensated by the fee paid when the application for transfer was filed for any work performed for the transferee.

In transferring the license the Commission is granting to the transferee a privilege similar to the grant of a construction permit for a new station. In considering the value of the transfer the Commission noted "unlike construction permits, which often involve competitive applications and comparative hearings and which simply authorize a new station of undetermined profitability, assignments of license and transfer of control

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tion, may petition the Commission for a waiver of the annual operating fee for a given period, and show good cause for relief requested." 28 F.C.C.2d 143 (1971).

[10] Clay Broadcasting Corporation of Texas; WBLI, Inc.; Dorothy Meythaler, Executrix of the Estate [Last Will and Testament] of Merlin J. Meythaler and Merton J. Gonstead d/b/a Livingston County Broadcasting Company and Dorothy Meythaler and Merton J. Gonstead d/b/a Pontiac FM Broadcasting Company; Steuben Broadcasters, Inc.; Forward Communications Corporation.

[11] See f.n. 6, *supra*.

are insulated from competition and concern a going business whose profitability is reflected in a judgment by the parties who have reached agreement on the price to be paid." 21 F.C.C.2d at 506-07. Given this explicit consideration of the "value of the benefit conferred" with the cost to the government and public policy involved we are not persuaded that a grant fee measured by 2% of the consideration paid is unreasonable.

A more serious question is presented by the individual petitioners with respect to the time schedule adopted by the Commission for the institution of these grant fees. In the schedule the Commission set an "effective" date of August 1, 1970, after which the grant fees would be imposed. However the Commission exempted from this fee those applications granted after August 1, 1970 but which were filed with the Commission prior to July 1, 1970. Two of the individual petitioners, Meythaler and Steuben, filed applications on July 1 and 2, 1970, but prior to the public announcement that the new fee schedule had been adopted and that it would apply to the grant of their applications. Essentially they contend that they relied on the prior fee schedule in negotiating their contracts and that the new rule has the effect of retroactively applying the grant fee to them.

The remaining petitioners, Clay, Forward and WBLI, all filed applications for transfer or assignment during July 1970 but after the Commission had published the new schedule. These petitioners contend that notwithstanding the Commission's assignment of August 1, 1970 as the "effective" date, the real "impact" date was July 1, 1970. They therefore argue: (1) the commission erred in distinguishing the filing date from

the "effective" date; (2) the Commission violated the Administrative Procedure Act [12] and its own rules [13] in providing no notice or less than 30 days notice prior to the "effective" date of the rule; and (3) that once the Commission decided to afford an exemption for some applications on file prior to the effective date it could not lawfully exclude July filed applications from this exception. Although we might well have done otherwise if the question was ours to decide in the first instance, we can not find that the Commission's chosen "effective" date and its exemption are arbitrary, unreasonable or unlawful.

Despite arguments to the contrary we are not convinced that the grant fee is being applied retroactively to applications filed in July. The fee is not automatically imposed on all filed applications for assignment or transfer. The 2% fee is charged only after the Commission has processed the application and decided to grant the transfer or assignment. Even then the fee is not required unless and until the consummation of the assignment because of the uncertainties of the date of closing and other factors.[14] The closing of the transfer or assignment following Commission approval is an event of sufficient independence from the mere filing of the application that the imposition of a fee upon transfers to be made in the future is not a retroactive fee upon those applications already on file but not yet granted. Thus we are unable to conclude that the Commission acted arbitrarily in using the date of grant for

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[12] U.S.C. § 553(d) (1971).

[13] C.F.R. § 1.427 (1971).

[14] 23 F.C.C.2d at 888.

the "effective" date of the fee instead of the date of filing. *See Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220, 227 (D.C. Cir. 1967).

In the Commission's Report and Order adopting the new fees it stated that the fees were being made "effective" on August 1, 1970, although it was aware that 30 days' official notice by publication in the Federal Register was not possible.[18] The Commission noted that it believed that good cause existed for an August 1, 1970, effective date citing three factors: (1) widespread notice in fact would be provided affected parties; (2) a first of the month effective date was required for administrative pro-ration of yearly fees; and (3) that in accordance with Congressional directives the Commission wanted the fee schedule to cover as much of fiscal 1971 as reasonably possible. We find that the Commission's statement of "good cause" sufficiently meets the requirements of both the Administrative Procedure Act and the Commission's rules.; *See Buckeye Cablevision, Inc.*, 387 F.2d at 228 n. 34; *cf. Pent-R-Books, Inc. v. United States Postal Service*, 328 F.Supp. 297, 312 (E.D. N.Y. 1971).

We are also not convinced that the Commission either was required to include or was unreasonable in excluding July filed applications for transfer or assignment from the exception to the grant fee afforded applications filed prior to July 1, 1970. There is something arbitrary about the drawing of any administrative line. To some extent whether a line appears to be "reasonable" to a party depends upon which side of the line the party falls. The difficulty in drawing fair and rea-

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[18] 23 F.C.C.2d at 885.

sonable lines in the communication industries is considerably exacerbated by the rapid technical and economic expansion of the various media. *E.g., Buckeye Cablevision, Inc. v. F.C.C.*, 387 F.2d 220 (D.C. Cir. 1967) ['Grandfather clause' permitted systems carrying distant signals before the regulations were announced to continue to do so]; *Kessler v. F.C.C.*, 326 F.2d 673 (D.C. Cir. 1963) ['Freeze' on new station applications effective when announced although applications then on file would be processed].

In the present case the Communications Act has a built in 30 day holding period on applications for assignment or transfer before the Commission may grant them.[16] In excepting those applications already on file by July 1, 1970, the Commission excluded from the grant fee those applications which it had the authority to grant prior to the August 1, 1970 effective date of the fee.

In response to criticism following the adoption of the fees the Commission noted that it had established this exception in order to eliminate any claim that action on matters filed prior to the date of adoption of the new fee schedule might be delayed until on or after August 1, 1970, so as to be able to exact the new grant fees. 28 F.C.C. 139, 141 (1971). The Commission also noted that no claim of surprise as to the adoption of the new fee schedule can properly be made, since the notice of proposed rule making had been issued in February 1970, 4½ months prior to July, 1970, and since the Commission's representations to the Congress that a new fee schedule would be adopted by the beginning of fiscal

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[16] 47 U.S.C. § 309(b) (1971).

year 1971 had been widely reported. *Id.* As in *Kessler,* "The issue is not what we might have done ourselves or what we might think would have been more reasonable. The issue is whether what the Commission did, in the light of the reasons it gave, was unreasonable and capricious." 326 F.2d at 686. Here, as in *Kessler,* we cannot conclude that it was.

III. *Annual Fee for CATV*

The National Cable Television Association, Inc. (NCTA) and the California Community Television Association jointly challenge the portion of the Commission's fee schedule which imposes an annual fee of $.30 per subscriber on all CATV systems. NCTA contends that the Commission lacks the authority to impose any sort of an annual fee in cable television, and that in any event this annual fee fails to meet the statutory requirements [17] and amounts to a tax because it fails to consider the statutory element of "value to the recipient" (i.e., the CATV operators) conferred by the FCC regulation of the industry. Finally NCTA asserts that the fees charged CATV operators are based upon a miscalculation of the actual costs of regulating CATV and that the fees are disproportionately higher for CATV than for other regulated industries. We find no merit in any of these contentions.

The Commission's efforts to regulate CATV have not been consistent.[18] The new technology which made cable television possible was thought at first to fall wholly

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[17] 31 U.S.C. § 483a (1971).

[18] United States v. Southwestern Cable Co., 392 U.S. at 161 to 167, 20 L.Ed.2d at 1007 to 1010. *See also,* Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366 (1965).

between the cracks of the Commission's statutory authority,[19] but in recent years the Commission has asserted an increasingly expansive jurisdiction over cable TV. The potential economic impact of CATV technology on other broadcast media spawned the initial regulatory efforts by the FCC.[20] This collateral impact on other regulated media has been used to justify the Commission's "ancillary" regulation of CATV. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 20 L.Ed.2d 1001, 1016 (1968).[21] In *General Telephone Co. of Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971) we upheld the Commission's rules which prohibited telephone companies from furnishing CATV services in their telephone service areas and restricted their construction of cable facilities. Although the question in that case was whether the Commission had properly exercised its unquestioned authority over common carriers,[22] we recognized that the development of CATV is part of the broader purpose of the Commission under 47 U.S.C. § 151.[23] 449 F.2d at 854.

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[19] *See*, 1959 Report and Order, 26 F.C.C. 403, 426-31.

[20] Carter Mountain Transmission Corp. v. F.C.C., 32 F.C.C. 459 (1962) *aff'd*, 321 F.2d 359 (D.C. Cir. 1963), *cert. denied* 375 U.S. 951 (1963).

[21] The Court stated: "There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting . . . We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. at 178, 20 L.Ed.2d at 1016.

[22] 47 U.S.C. § 214 (1971).

[23] "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make

Most recently the Supreme Court in *United States v. Midwest Video Corp.*, —— U.S. ——, —— L.Ed.2d ——, 40 L.W. 4626 (June 7, 1972), has held that the Commission has jurisdiction under 47 U.S.C. § 152(a) over CATV systems and operations which may be exercised to protect and promote the objectives for which the Commission had been assigned jurisdiction over broadcasting. —— L.Ed.2d at ——, 40 L.W. at 4632. The court upheld the Commission's authority to require that CATV systems with more than 3,500 subscribers operate to a significant extent as a local outlet by originating programing and make available facilities for local programing.

It seems apparent to this court that under the Commission's regulatory scheme which existed from the time of the adoption of these fees until the present, CATV operators have received "valuable benefits" sufficient to justify the imposition of the annual fee. Although the Commission does not issue licenses for CATV systems as it does for broadcast stations, CATV operators have directly benefited from the Commission's various regulations designed to keep entry into the industry open.[24] The Commission has also proposed

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available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and communication service with adequate facilities at reasonable charges, . . . there is created a commission to be known as the 'Federal Communications Commission' . . ." 47 U.S.C. § 151 (1971).

[24] *See* General Telephone Company of the Southwest v. United States, 449 F.2d 846 (5th Cir. 1971) [in which NCTA intervened in support of the Commission's regulations]. The Commission has restricted television broadcast station and translator station ownership of CATV systems in their service area, 23 F.C.C.2d 816 (1970), prohibited broadcast network ownership of cable systems, 23

rules limiting the amount of franchise fees which local governments could charge cable operators.[25] Indeed, as the Commission points out, the entire regulation of cable television is undergoing radical change, much of which clearly inures to the benefit of cable operators.[26]

It is true that some of the Commission's direct regulation of CATV has tended to restrict cable development in order to protect other media.[27] But the inquiry under 31 U.S.C. 483(a) is not whether the regulated industry likes or agrees with all the regulations prescribed, but whether the members of the industry have benefited in a manner different from the public at large from the regulatory scheme provided by the Commission. CATV operators in effect merchandise the broadcast signals which the Commission has authorized by its regulation. The scarcity of television outlets which exists under the Commission's regulation of the broadcast market structure creates much of the economic value of the distant signal importation by CATV. It is therefore clear the CATV operators do receive benefits of real value from the Commission's regulation of CATV and the related broadcast media.

We have already observed in Section I of this opinion that the statutory factors of benefit, costs and policy are for the Commission to weigh. *Aeronautical Radio, Inc.*, supra. In this instance the Commission observed:

F.C.C.2d 816 (1970), and proposed rules banning cross-ownership of newpapers and cable systems in the same area, 23 F.C.C.2d 833 (1970).

[25] Notice of Proposed Rule Making, CATV, Docket No. 18892, 25 F.C.C.2d 50, 53 (1970).

[26] Cable Television Proposals, 31 F.C.C.2d 115 (1971).

[27] E.g., Buckeye Cablevision, Inc. v. United States, 438 F.2d 948 (6th Cir. 1971).

"47. The 30-cents-per-subscriber-annual-fee formula has been attacked on diverse grounds: that it fails to take into consideration that different systems charge different subscription rates; that operating costs vary even when subscription rates are the same; that in some cases local franchise agreements bar systems from passing increased costs on to subscribers via rate increases; and that the 30-cents-per-subscriber fee would cut sharply into narrow profit margins.

48. The very diversity of these criticisms (which were not accompanied by specific supporting data) suggests that it would be exceedingly difficult to devise a formula that would be proof against all attack. In defense of the formula adopted, we would note: (i) that generally available information about the CATV industry indicates that subscription rates tend to cluster at about $5 per month or a bit higher; (ii) that 30 cents per subscriber per year appears to constitute in the typical case only one-half of 1 percent of CATV system gross revenues from subscription fees, if that much; (iii) that, particularly in view of the smallness of the fee, alternative formulas involving more complicated calculation to verify adequacy of fee payment might be more precise but, under the circumstances, are unnecessary; (iv) that the Commission lacks reliable information about the operations and internal finances of CATV systems, but is currently readying new rules and procedures which will enable it to obtain such information, via annual, reporting by CATV systems; and finally, (v) that as the Commission obtains such informa-

tion it will use it for periodic review of the equity of its CATV fee schedule."

23 F.C.C. at 897-88 (1970).

The Commission's formulation clearly evidences consideration of the benefits to CATV systems as measured by the number of subscribers, the direct and indirect costs of the Commission's efforts to regulate the industry, and the Congressional policy that the Commission make its work of specific benefit "self-sustaining to the full extent possible," under 31 U.S.C. 483a. Considering all factors revealed by the record the balance which the Commission struck was not unreasonable or arbitrary in our opinion. If experience shows that the Commission's fees are unfair, unworkable or have an adverse effect on competition in the CATV industry the Commission can be expected to revise them in order to meet the exigencies of the competitive situation. *General Telephone Company of the Southwest v. United States,* 449 F.2d 846, 858 (5th Cir. 1971).

For the reasons stated we find that the Commission did not exceed or abuse its statutory authority in imposing the fees contained in its July 1, 1970, Report and Order. The order of the Commission is in all respects AFFIRMED.

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